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No. 514

IN THE

Supreme Court of the United States

October Term, 1938

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

BENJAMIN FAINBLATT and MARJORIE FAINBLATT, individuals, doing business under the firm name and styles of Somerville Manufacturing Company and Somerset Manufacturing Company,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS

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The Somerset Press, Inc. — 1 Somerville, N. J.

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FACTS

Since the brief for the National Labor Relations Board contains a full and substantially correct recital of the facts and the proceedings below and since the only question to be considered in this brief is the National Labor Relations Board's jurisdiction over the respondent, it is not deemed

necessary to re-state such here, but the facts relating to that question will be referred to and discussed in the argument.[1]

SUMMARY OF ARGUMENT

The Court below properly held that the National Labor Relations Act could not validly be applied to respondent's business for the following reasons:

1. Respondent's business is one admittedly intrastate in character, with no interstate ramifications whatsoever, bearing no close and intimate relation to interstate commerce and having no direct and substantial effect upon such commerce within the meaning of the National Labor Relations Act.

2. Even if the respondent is subject to the jurisdiction of the Board, that jurisdiction should not be exercised in this case because

a. The respondent's business is wholly intrastate in character and, therefore, subject to the plenary power of the State of New Jersey.

b. The Board has failed to allege and clearly prove that the alleged unfair labor practices of the respondent do actually threaten interstate or foreign commerce in a substantial manner.

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[1]There is testimony in the record that at the time of the alleged unfair labor practices and the making of the complaint herein the business in question was owned by Benjamin Fainblatt. There is also testimony in the record that it was owned by Marjorie Fainblatt until January 1, 1937, since which time it has been owned and operated by Benjamin Fainblatt. However, since the Board has found that Benjamin Fainblatt was and is the real owner of the business and that Marjorie Fainblatt was merely a nominal registered owner, (II. R. 233), the term 'respondent', as used in this brief, will refer to Benjamin Fainblatt.

ARGUMENT

I

Respondent's business is one admittedly intrastate in character, with no interstate ramifications whatsoever, bearing no close and intimate relation to interstate commerce and having no direct and substantial effect upon such commerce within the meaning of the National Labor Relations Act.

At the outset, we deem it important to call attention to the fact that in none of the cases heretofore decided by this or any other Court have the facts been identical with those in the case at bar. The record reveals, and the Board admits, that the respondent is a manufacturer of women's sportswear with his place of business located in a small building in Somerville, New Jersey. The business consists solely of manufacturing unfinished dress goods into women's sportswear. Both the unfinished goods and the finished garments are the property of a partnership in New York City known as the Lee Sportswear Company, which is engaged in marketing women's sportswear, and the respondent at no time has title to, or other property interest in, the unfinished goods or the finished garments. While the respondent and the partners in Lee Sportswear Company are members of the same family, the evidence is uncontradicted, it is admitted by the Board, and it was found by the Court below, that their respective enterprises are financially and otherwise independent of each other, viz: there is absolutely no business connection, either directly or indirectly, between the respondent and Lee Sportswear Company, other than the usual relationship of manufacturer and customer (I. R. 475, 515, 516). The raw materials are purchased and delivered, or caused to be delivered, by Lee Sportswear Company to its represen-

tative at Somerville, New Jersey, who, in turn, delivers them to the respondent at his manufacturing plant. The finished products are delivered by the respondent to the representative of Lee Sportswear Company at the plant in Somerville and by the latter are taken, or caused to be taken, therefrom (I. R. 84-90; II. R. 145, 180, 181, 182, 183). The respondent neither transports nor causes to be transported the unfinished goods or the finished products to or from his plant at any time, nor has he the facilities for so doing (I. R. 50-52, 84-90; II. R. 145, 180-183). He acts as agent for no one nor is his business connected directly or indirectly, in a financial or any other manner, with the business of any other person or corporation (I. R. 85, 86, 88, 90, 112). The respondent purchases no raw materials, sells no finished products, does not engage in shipping or transportation of any character, either intrastate or interstate, and is engaged solely in a manufacturing business which is purely local in character (I. R. 50, 51, 88-90; II. R. 180-183). At the time of the complaint in this case (which is the basis for the alleged jurisdiction of the Board) he employed approximately 60 persons (I. R. 52; II. R. 150, 151). While the respondent's production was slightly decreased, at or about the time of the complaint herein, as the result of a seasonal slack and a strike of some of his employees (II. R. 77-79), the record reveals, and it is not disputed by the Board, that the business of Lee Sportswear Company, (respondent's only customer), was in nowise affected thereby, because it was able to acquire the same manufacturing services from other sources (II. R. 181, 182, 186). The record also establishes as undisputed facts not only that Lee Sportswear Company was not affected by the slight decrease in the respondent's production but that it would not be affected if the respondent's production ceased altogether, because it was in nowise

dependent upon the respondent's business, having other sources of supply (II. R. 181, 182, 186). While the record reveals that most of the unfinished goods which were delivered to the respondent for manufacture were shipped, or caused to be shipped, by Lee Sportswear Company from other States, they were always delivered, in the first instance, to the representative of Lee Sportswear Company at the respondent's plant and were thereafter delivered by him to the respondent for manufacture. At the time the unfinished goods were acquired by the respondent, they had come to rest in the State of New Jersey. Similarly, the finished garments were delivered by the respondent to the representative of Lee Sportswear Company at the plant in Somerville and were by the latter shipped or delivered to its customers (I. R. 50-52, 86, 88, 89; II. R. 182, 183). The source of the unfinished goods and the destination of the finished garments of his customer were of no concern to the respondent. Insofar as the record reveals, his activities were purely local in their scope and intent and the activities of his sole customer, whether in intrastate or interstate commerce, were of no concern to him. Most, if not all, of the foregoing facts have been admitted by the Board, not only in its stipulation with the respondent at its hearing below (I. R. 88, 89), but also in the briefs of both the Board and the International Ladies' Garment Workers' Union.

The rules and guiding principles to be applied to cases such as that at bar have been evolved and reiterated by this Court in a series of recent decisions.

A. L. A. Schechter Poultry Co. v. *United States*, 295 U. S. 495

Carter v. *Carter Coal Co.*, 298 U. S. 238

National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1

National Labor Relati ns Board v. *Freuhauf Trailer Co.*, 301 U. S. 49

National Labor Relations Board v. *Freidman-Harry Marks Clothing Co.*, 301 U. S. 58

Santa Cruz Fruit Packing Co. v. *National Labor Relations Board*, 303 U. S. 453

Consolidated Edison Co. v. *National Labor Relations Board*, 83 L. Ed. 131, 59 Sup. Ct. Rep. 206

They would appear to be well settled and the only difficulty arises in their application to a particular case. This Court has said repeatedly that in enacting the Act in question, Congress did not attempt to deal with particular instances and that whether particular action in the conduct of an intrastate enterprise affects interstate or foreign commerce in such manner as to be subject to Federal control is to be determined as individual cases arise.

National Labor Relations Board v. *Jones & Laughlin Steel Corp., supra*

Santa Cruz Fruit Packing Co. v. *National Labor Relations Board, supra*

Consolidated Edison Co. v. *National Labor Relations Board, supra*

In conferring authority upon the Board, Congress had regard to the limitations of the Constitutional grant of Federal power.

National Labor Relations Board v. *Jones & Laughlin Steel Corp., supra*

Consolidated Edison Co. v. *National Labor Relations Board, supra*

The "commerce" contemplated by the Act (aside from that within a Territory or the District of Columbia) is in-

terstate and foreign commerce and the unfair labor practices which the Act purports to reach are those affecting that commerce.

Consolidated Edison Co. v. *National Labor Relations Board, supra*

It is conceded that it is the "effect" upon interstate or foreign commerce, not the source of the injury, which is the criterion.

National Labor Relations Board v. *Jones & Laughlin Steel Corp., supra*
Consolidated Edison Co. v. *National Labor Relations Board, supra*

The difficulty arises in determining the manner in which and the extent to which the particular intrastate enterprise must affect interstate or foreign commerce within the meaning of the Act. This Court has variously expressed that relationship. It has said that the enterprise must have a "close and substantial relation" to interstate or foreign commerce; that such commerce must be affected in a "close and intimate fashion"; that the effect upon such commerce must be "direct" and not "indirect"; that the effect must have "immediacy or directness" and not a "remote effect"; and that such commerce must not be "unduly burdened".

A. L. A. Schechter Poultry Co. v. *U. S., supra*
Carter v. *Carter Coal Company, supra*
National Labor Relations Board v. *Jones & Laughlin Steel Corp., supra*
Santa Cruz Packing Co. v. *National Labor Relations Board, supra*
Consolidated Edison Co. v. *National Labor Relations Board, supra*

In the concurring opinion of the late Mr. Justice Cardozo, in the case of *A. L. A. Schechter Poultry Co.* v. *U. S.*, *supra*, he very strongly intimates that the effect upon such commerce must be *substantial*. He said, at page 554:

> "There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours 'is an elastic medium which transmits all tremors through its territory; the only question is of their size.' Per Learned Hand, J., in the court below. The law is not indifferent to considerations of degree. Activities local in their immediacy do not become interstate and national because of distant repercussions. . . . There is no penumbra of uncertainty obscuring judgment here. To find immediacy or directness here is to find it almost everywhere. If centripetal forces are to be isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our federal system."

This interpretation not only appears to be accepted by the Board and the International Ladies' Garment Workers' Union in their briefs (Board's brief, pages 14 and 17; Union's brief, page 11), but also has the support of at least one United States Circuit Court of Appeals and others who have carefully studied and analyzed the earlier opinions of this Court.

National Labor Relations Board v. *Idaho-Maryland Mining Corp.*, 98 Fed. (2d) 129

6 GEORGE WASHINGTON LAW REV. 436, at 451

In the *Idaho-Maryland Mining Corp.* case, *supra*, it was said, at page 131:

> "If however, such acts may be said to constitute commerce, it is a commerce to which respondent's activities are not closely, intimately or substantially related, and which respondent's labor practices do not directly or *substantially affect.*" (Italics ours)

Another analyst concludes that the effect must be "appreciable". 47 YALE LAW JOURNAL 1221, at 1224.

The difficulty in finding proper formulas to guide in the application of the principles aforesaid was recognized by this Court in the *Santa Cruz* case, *supra*, where the Court said, at page 466:

> "To express this essential distinction, 'direct' has been contrasted with 'indirect' and what is 'remote' or 'distant' with what is 'close and substantial'. Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as 'interstate commerce', * * *. * * * In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion.
>
> "There is thus no point in the instant case in a demand for the drawing of a mathematical line. And what is reasonably clear in a particular application is not to be overborne by the simple and familiar dialectic of suggesting doubtful and extreme cases.

> * * * The question that must be faced under the Act upon particular facts is whether the unfair labor practices involved have such a close and substantial relation to the freedom of interstate commerce from injurious restraint that these practices may constitutionally be made the subject of federal cognizance through provisions looking to the peaceable adjustment of labor disputes."

As stated above, "Whatever terminology is used, the criterion is necessarily one of degree and must be so defined".

What is the practical test? How are we to determine what is "direct" as contrasted with "indirect" and what is "remote" or "distant" with what is "close and substantial" or "close and intimate"? Do these terms refer to the proximity of the business in question to interstate or foreign commerce? That is to say, is an intrastate business, which to some extent directly engages in interstate transactions, or in which transactions in interstate commerce immediately precede or follow its intrastate business activity, to be considered "direct" in its effect upon such commerce, whereas such a business which is not engaged directly in interstate transactions or is several degrees removed from transactions in interstate commerce, to be considered "indirect" in its effect upon such commerce? Or is the test the extent to which the labor practices in such intrastate business actually, or might, obstruct or affect interstate commerce, regardless of the proxmity of the business to interstate or foreign commerce? In other words, will a purely intrastate business, having neither interstate ramifications as part of its business nor close proximity to activities in interstate commerce but whose labor practices have affected, or would affect, in a

very serious and substantial manner the interstate activities of those who are directly dependent upon it, be considered as having a "direct" effect upon such interstate commerce, whereas, similar enterprises, so limited in their activity that their labor practices could in nowise affect in a serious and substantial manner the interstate commerce of those with whom they do business, will be considered as having an "indirect" effect upon such commerce? We submit that neither test alone can be considered as decisive and controlling but that the determination in any particular case must be reached by a consideration of both.

As we have seen, the entire problem involves a question of degree. How far has this Court gone in the past in extending the jurisdiction of the Board to the field of industry? What were the determining factors in applying the Act in each case? How far should this Court go in applying the Act? It is respectfully submitted that the rules and principles heretofore laid down by this Court and referred to above are of little practical assistance in determining their applicability to a particular factual situation. The scope of the Board's jurisdiction must be determined from the rational and practical application of such rules and principles in a given factual situation, keeping in mind always the definite determination of this Court not to obliterate the distinction between what is national and what is local in character. This Court has said that the Act should be applied, of course, to enterprises which are fundamentally interstate in character, regardless of the extent of their effect upon interstate commerce (*Associated Press* v. *National Labor Relations Board*, 301 U. S. 103; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261); that it should be applied to enterprises which are intrastate in their principal activity but which have definite and direct interstate attributes

and ramifications, particularly where, because of the size and extent of the enterprise, the effect upon interstate commerce of labor difficulties therein would be substantial, serious, and even catastrophic (*National Labor Relations Board v. Jones & Laughlin Steel Corp., supra; National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co., supra; National Labor Relations Board* v. *Fruehauf Trailer Co., supra; Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board, supra*); and that it should be applied to those enterprises, purely intrastate in character and with no direct connection with interstate commerce but which are of such tremendous proportions that the effect of labor disturbances therein upon interstate commerce could be nothing but serious and catastrophic. (*Consolidated Edison Co.* v. *National Labor Relations Board, supra*).

In all of these factual situations, there may well be sound reasoning and desirable public policy for applying the Act. On the other hand, this Court has definitely said that where the enterprise is purely local in character, with no direct connection with interstate commerce, and where it did not appear that the actual effect upon interstate commerce was either direct or substantial, the effect upon interstate commerce was too indirect and remote to bring such enterprise within the commerce clause. *A. L. A. Schechter Poultry Co.* v. *U. S., supra.* It has gone even further and held that in a business which is primarily local in character but which has certain interstate ramifications involving the transportation of its products in interstate commerce, the effect upon interstate commerce is too indirect and remote to sustain Federal jurisdiction. *Carter* v. *Carter Coal Co., supra.* It is not for us to say that it seems difficult, if not impossible, to reconcile this last mentioned factual situation with some of those in which this Court has held that there was a

basis for Federal jurisdiction. This Court has expressly said that there is no conflict between the *Carter* case and those in which this Act was held to apply; hence, we must assume that it is still good law. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp., supra; Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board, supra.*

What conclusions are we justified in drawing from these cases? What are the elements upon which Federal jurisdiction is founded? Manufacturing, or, in a larger sense, production, has always been considered by this Court as inherently indirect in its effect upon interstate commerce, no matter how extensive.

Kidd v. *Pearson*, 128 U. S. 1
United States v. *E. C. Knight Co.*, 156 U. S. 1
A. L. A. Schechter Poultry Co. v. *U. S., supra*
Carter v. *Carter Coal Co., supra*
National Labor Relations Board v. *Jones & Laughlin Steel Corp., supra*

In the *Schechter* case, this Court seemed to feel that where one was engaged solely in a purely intrastate enterprise, notwithstanding the raw materials for such enterprise were transported in interstate commerce almost immediately preceding their use in that enterprise, the relationship to interstate commerce was too "indirect" and "remote". True, this conclusion was based somewhat upon the fact that before the raw materials were used in the enterprise they actually came to rest within the State and thus were out of interstate commerce. In the *Carter* case, however, this Court held that even though the local enterprise was directly engaged in shipping its products

in interstate commerce, the effect of its purely local business had too indirect and remote an effect upon such commerce. In the *Jones & Laughlin, Friedman-Harry Marks, Fruehauf* and *Santa Cruz* cases, this Court seemed to think that the large interstate ramifications which formed a direct part of the business in each case were sufficient justification for concluding that the effect upon commerce was direct and immediate. In each of these last mentioned cases, the business in question was one of the largest enterprises in the particular industry in this country and this Court took pains to expressly point out the serious and substantial interference with interstate commerce which would, or did, result from the consequences of unfair labor practices in each business. In the *Jones & Laughlin* case, this Court said, at page 41:

> "In view of the respondent's far flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. * * * When industries organize themselves on a National scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?"

In the last case on this subject decided by this Court, it, for the first and only time (so far as jurisdiction under this Act is concerned), considered an enterprise which was purely local and intrastate in its activities and which in nowise engaged in interstate commerce, either directly or

indirectly (if we ignore the purchase of raw materials through interstate commerce, which apparently this Court did in reaching its conclusion). *Consolidated Edison Co. v. National Labor Relations Board, supra.* Yet, in that case, this Court seemed to feel that, because of the tremendous size of the intrastate business, the consequences of unfair labor practices therein would necessarily be "catastrophic" to many of its customers engaged directly in interstate commerce, and, therefore, that the effect of such labor practices upon such commerce must be direct and immediate.

While we cannot say that mere size in itself is determinative of directness or indirectness in the effect upon interstate commerce, any practical and sensible application of the principles governing these cases to enterprises wholly intrastate in character dictates that their size and the extent of the actual, or probable, obstruction to and interference with interstate commerce resulting from labor disturbances therein, should be considered as important in determining whether they affect such commerce within the meaning of the Act. Where an enterprise is wholly interstate in its activities, the consequences of labor practices therein must, of necessity, be direct in their effect upon interstate commerce, regardless of size. We may even say the same with respect to those enterprises, local and intrastate as to their production activities, but which directly engage or participate in interstate activities. But there certainly can be no justification for extending the rule to all enterprises, such as that in the case at bar, which are purely local and intrastate in character with no interstate ramifications, where the effect of such labor practices upon interstate commerce is, or may be, only inconsequential or infinitesimal.

In no case yet presented to this Court has there been a factual situation such as that in the case at bar. The *Consolidated Edison* case, *supra*, is the only one heretofore decided by this Court involving the application of the Act to a wholly intrastate enterprise. This case clearly differs from the case at bar, both in respect to the size of the enterprise involved and the extent of the consequences upon interstate commerce. By no stretch of the imagination is it possible to conceive that any unfair labor practices in the respondent's business could have seriously harmful and catastrophic consequences upon interstate commerce.

It is obvious that the degree of closeness and intimacy to interstate commerce also is an important element to be considered. In every case decided by this Court it appeared either that the business in question was engaged directly and primarily in interstate commerce, or that it engaged directly in some phase of interstate commerce as an adjunct of its primary purpose of production, or that interference with or the cessation of its intrastate activities would seriously and substantially affect interstate commerce.

Where is the line to be drawn in enterprises solely intrastate in character with no interstate ramifications? We respectfully submit that in determining the effect upon interstate commerce of unfair labor practices, within the meaning of the Act, this Court should consider not only the degree of proximity of the main business activities to interstate commerce, to determine whether they are sufficiently "close and intimate" to such commerce, but should consider also the extent of the actual, or probable, effect upon such commerce resulting from such unfair labor practices. Unless such is done, we are forced to the obviously erroneous conclusion that the Act is intended to apply, and will be applied, to all enterprises which are purely local and intrastate in character and which, in any degree, affect

interstate commerce, no matter how imperceptibly or remotely. It seems to us, and it is respectfully submitted, that unless it is clearly shown by the Board that the consequences of unfair labor practices in a wholly intrastate venture are, or will be, seriously harmful, if not catastrophic, to interstate commerce, the whole matter should be left to the plenary power of the State, and a basis for Federal jurisdiction should not be found. Frankly, we realize that the line of demarcation is not one easy to define, in fact, it may be impossible of definition. But we strongly urge that jurisdiction should not be extended to those cases, such as that at bar, involving enterprises which are obviously, clearly and solely intrastate in character, simply because such ventures happen indirectly to affect interstate commerce to some slight degree. Not only that, but we also urge that unless there is proof by the Board that unfair labor practices in a given intrastate business have actually resulted, or could reasonably be expected to result, in serious and substantial consequences to interstate commerce, Federal jurisdiction should not be found. While we do not insist that the consequences necessarily be "catastrophic", we do think they should be at last *serious and substantial.*

None of these elements appear in the case at bar. In fact, the proofs are all to the contrary. There was a slight diminution in the flow of production from the small business of the respondent. Actually, however, the business of his sole customer not only was not in anywise affected but would not have been affected if the respondent's production had ceased altogether (II. R. 181, 182, 186). Respondent's business was too small and insignificant a unit in his industry to have had materially or substantially harmful consequences of any kind, either to the industry as a whole or to interstate commerce.

To argue in the abstract that the mere diminution in the flow of the respondent's products through the channels of interstate commerce amounts to an obstruction of or interference with that commerce seems to us to be arguing in an "intellectual vacuum". The diminution in the business of any purely local, intrastate enterprise, of necessity, must actually affect, in some degree, the flow in interstate commerce. The purpose of the Act is not to protect an abstract entity called "interstate commerce", but is for the protection of those who, through that commerce, deal with that which is produced. If, in fact, no harm has come, or is likely to come, in the case at bar, what possible reason can there be for applying the Act? We respectfully submit that there is, and can be, none.

Both the Board and the Union cite numerous decisions of the Board and various Circuit Courts of Appeals in support of their contention that the alleged unfair labor practices in the respondent's intrastate business affect interstate commerce within the meaning of the Act. Without prolonging this brief by a recital of the facts in each of the cases thus cited, it is enough to say that a very careful analysis of each reveals that in none were the facts the same, or even similar, to the case at bar and that in all of them where it was found that the Board had jurisdiction the enterprise in question either was engaged in interstate commerce directly or had some interstate ramifications to its main business. For these reasons, therefore, it is deemed that none of these cases are controlling and that they should be disregarded by this Court in its disposition of the case at bar.

It is suggested in the Union's brief that the case at bar is to be distinguished from the *Schechter* case, *supra*, because in that case the poultry came to a permanent rest in the State before it came into the hands of the local busi-

ness and also because it was designed for distribution within the State thereafter, whereas in our case the unfinished goods are shipped in interstate commerce to the respondent's plant with the intent that they shall remain there but temporarily and shall thereafter be shipped again, in finished form, in interstate commerce. The suggestion that the raw materials manufactured into finished products are but temporarily in the State and have not come to rest before delivery to the respondent is far from accurate. Actually, the respondent had no part in the transportation of the raw materials to his place of business (I. R. 50, 88-90; II. R. 180, 181). They were always received by a representative of his customer within the State of New Jersey and came to rest there before delivery by the customer to the respondent for manufacturing. Delivery of the finished product was made thereafter by the respondent to his customer within the State of New Jersey at his place of business, and it was only after such delivery had been completed within the State of New Jersey that shipments were made by the customer to its trade (I. R. 50, 88; II. R. 180-181). In the case at bar, the unfinished goods had terminated their journey in interstate commerce before they were delivered to the respondent by his customer for manufacture. During the manufacturing process, they lost their identity completely and it was as an entirely different product that they were sometime thereafter delivered to the respondent's customer in the form of finished garments. This is not a case of continuity of transit in interstate commerce between seller and buyer in which the respondent directly participates, where the transitory stop is a convenient step in the process of getting the product to its final destination. In this connection, the language of this

Court in the *Carter* case is pertinent. This Court said, at page 301:

> "That commodities produced or manufactured within a state are *intended to be sold or transported outside the state* does not render their production or manufacture subject to federal regulation under the commerce clause." (Italics ours)

In the same connection, the Second Circuit Court of Appeals, in the case of *National Labor Relations Board* v. *National New York Packing & Shipping Co.*, 86 Fed. (2d) 98, said, at page 99:

> "Nor does an interstate journey justify federal regulation of local activity which follows the termination of that journey. A. L. A. Schechter Poultry Co. v. United States, 295 U. S. 495."

It is difficult to conceive that this Court decided that the *Schechter* case did not come within the commerce clause upon the sole ground that the poultry which had come into the State of New York in interstate commerce had remained long enough in the possession of the brokers who sold it to the Schechter Company to be considered out of interstate commerce and into intrastate commerce. Any such conclusion would result in jurisdiction being determined on the basis of the length of time during which a particular product, coming in or passing out of the State through interstate commerce, had remained in the State either before or after processing or manufacturing within the State. It is our belief that that element was not decisive in the *Schechter* case and that it was but one of many facts in that case which this Court considered in determining that the

effect upon commerce was too remote and indirect. Furthermore, if the matter of jurisdiction were to be determined upon such a basis, there would be no possible way of reconciling the *Carter* case, *supra,* with any other case which has been decided by this Court, because certainly in that case the coal, immediately after being mined locally, was shipped directly in interstate commerce by the coal company and in no manner came to rest, either temporarily or permanently, in any other hands within the same State before being shipped in interstate commerce. Whether or not the commodities in question have come to a temporary or permanent rest within the State wherein the intrastate enterprise is located may be an element to be considered in determining the question of jurisdiction, but certainly, of itself, is far from controlling or conclusive.

Both the Board and Union also describe the respondent's activities as an integral part of the continuous stream and flow of interstate commerce and describe such activities as constituting a "bottle neck" or "throat" through which the raw materials flow from various States to the respondent's plant and through which "bottle neck" the finished products flow back into the stream of interstate commerce (Board's brief, page 18; Union's brief, pages 5-9). Reliance therefor is placed largely upon the decisions of this Court in the cases of *Stafford* v. *Wallace,* 258 U. S. 495, and *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1. The attempt to place the case at bar in the same category as those cases but forcibly illustrates the extreme danger of attempting to apply, arbitrarily, and in total disregard of the facts in a given situation, abstract principles or formulas. There is no more similarity in the facts between the case at bar and those cases than there is between the case at bar and the *Jones & Laughlin* case, *supra.* In the *Stafford* case, *supra,* Congress, after many investigations,

found that individual packing houses were taking advantage of their control over the stockyards and connected facilities to control the prices of cattle and although Congress undertook to regulate the activities of the stockyards in that phase of commerce and dealers in similar subjects, this Court found that although the Act of Congress was literally one regulating a local activity, yet those activities were connected with the general current of commerce to a substantial degree. The *Olsen* case, *supra,* involved the Grain Futures Act providing for the direct regulation of the practices of grain exchanges, the primary object being to control dealings in grain futures, and in the first instance, it did so through the device of a prohibitory tax, later invalidated by this Court in *Hill* v. *Wallace,* 259 U. S. 44. The second attempt to regulate future trading came, after a series of investigations into its abuses had led to the conclusion that such trading, unless subjected to regulation, could have disastrous effects upon commerce in grains. The Court upheld the Grain Futures Act in the *Olsen* case, although the activities of the grain exchanges and their members were purely local in character, applying a theory similar to that applied in the *Stafford* case. In the *Stafford* case, the Government was primarily concerned with preventing a conspiracy to restrain interstate trade and setting up some method of punishing such a conspiracy and this Court felt that if Congress could punish for a conspiracy to restrain interstate trade, it was a necessary consequence that it could provide means for preventing such conspiracies from the outset. Both the *Olsen* and the *Stafford* cases dealt with a situation that involved a focal point through which the stream of commerce shifted on its way from producer to ultimate consumer. Both decisions took a practical view of commerce and avowed that the power of Congress was not to be defeated by the

fact that its objects were merely local incidents of interstate commerce.

The *Olsen* case and the *Stafford* case are not, and should not be construed as, controlling in the case at bar. If we re arbitrarily to apply the general principles enunciated in those cases without regard to the very definite differences in the facts, we might as well totally disregard the admonition that every case must be decided upon its own facts and that whether particular intrastate activities have a close and substantial relation to interstate commerce and substantially affect that commerce, within the meaning of the Act, is always a question of degree.

The Board suggests in its brief that the respondent is relying solely upon the fact that he has title neither to the unfinished goods nor the finished garments which he manufactures as the basis for disclaiming the Board's jurisdiction. It cites two Circuit Court decisions (*National Labor Relations Board* v. *National New York Packing & Shipping Co., supra; National Labor Relations Board* v. *Hopwood Retinning Co.*, 98 Fed. (2d) 97) as authority for the proposition that title has no bearing upon the question of whether unfair labor practices in a particular enterprise affect interstate commerce within the meaning of the Act. It is not our contention that the mere fact that the respondent has no title at any time to either the raw materials or the finished garments which he manufactures is dispositive of the question of jurisdiction. Our only contention is that the fact is one to be considered with all of the other facts and circumstances in the case and that it is an indication that the respondent's business is not one which is engaged in or affects interstate commerce within the meaning of the Act. A reference to the two cases last above will disclose that the Board was found to have jurisdiction therein because the enterprise, in each case, involved certain activi-

ties upon its part in interstate commerce, such as the transportation, or the arranging for transportation as the agent of out-of-state buyers, in interstate commerce, of merchandise belonging to others. Quite naturally, the fact that the enterprises in question had no title to the goods of their customers at any time was not considered controlling, in view of their activities in, or directly affecting, interstate commerce. That the courts recognize the distinction between situations such as those in the cases cited by the Board and those in the case at bar is very clearly illustrated in the recent case of *National Labor Relations Board* v. *Fashion Piece Dye Works, Inc.*, decided November 28, 1938, (C. C. A. 3rd) No. 6559, in which Judge Maris, speaking for the Court, said:

> "The situation here is essentially similar [referring to the *Hopwood Retinning Co.* case.] * * *
>
> "The respondent relies upon National Labor Relations Board v. Fainblatt, 98 F. (2d) 615, in which this Court, one judge dissenting, held that a New Jersey tailoring concern which was engaged exclusively in finishing garments for a New York concern from cloth owned and furnished by the latter was not subject to the provisions of the Act. That case, however, is clearly distinguishable, and is not controlling here because there it appeared that Fainblatt engaged in no interstate transportation whatever, whereas in the case before us the respondent itself transported at least fifty per cent of the textiles to be processed into the State and the same percentage of the finished product out of the State."

Both the *National New York Packing & Shipping Co.* and the *Hopwood Retinning Co.* cases were similar to the

Fashion Piece Dye Works case on the facts and the reasoning of the Court in the last mentioned case is a sufficient answer to the Board's contention.

Both Board and Union argue that to permit the respondent to escape the jurisdiction of the Board will, in effect, result in a large portion of the women's garment industry escaping the jurisdiction of the Board by the formation of manufacturing units organized in a manner similar to the business of the respondent (Board's brief, pages 20-24; Union's brief, page 9). As to this, we need say only that such does not follow. The record clearly shows that the respondent's business was organized in its present form long before the Act was adopted by Congress[1] and there is not one scintilla of evidence that his business was organized for the purpose of evading the provisions of the Act. To reason that one whose business has been lawfully organized in such a manner as to lawfully avoid the jurisdiction of the Board should be subjected to that jurisdiction, because of the possibility that others might unlawfully reorganize their businesses in an effort to unlawfully evade the Act, is to say that the law abiding citizen should be penalized and punished for the acts of the criminal as a possible deterrent to others who might be tempted to commit such criminal acts—a *reductio ad absurdum*. Certainly, if proper evidence presented itself in a given situation that an attempt had been made to illegally and unlawfully evade such Federal regulation, appropriate consequences could be visited upon the offender and he could readily be brought within such regulation. Again we say that the mere fact that all enterprises organized in a manner similar to that of the respondent may escape the jurisdiction of the Board, if this respondent is

[1]The Board found that the respondent's business was established in August 1934 (I. R. 473). The National Labor Relations Act was approved July 5, 1935.

permitted to escape that jurisdiction, is no reason for finding such jurisdiction here. Unless that jurisdiction can be found within the Constitution and appropriate statutes, there is no basis for it whatsoever, no matter how socially desirable it might otherwise appear to be.

The briefs of both Board and Union are also replete with suggestions that the Act should be applied to this respondent because the women's garment industry is basically predicated upon interstate commerce; because the demoralization of that industry would have national interstate repercussions throughout the industry; and because if the Act is not applied to this small, wholly intrastate concern, which is an integral part of a large industry engaged in interstate commerce activities, the Federal protection designed by the Act will be denied to numerous workers similarly situated to the respondent's workers in the industry and their rights of self-organization and collective bargaining will be destroyed. In support of these suggestions, reliance is placed upon numerous statistical and industrial periodicals and other references (Board's brief, pages 21-24; Union's brief, pages 2-4). It is respectfully submitted that neither the suggestions nor the data submitted in support thereof should be considered by this Court in reaching its conclusions. In the first place, the record is barren of evidence in support of these suggestions and no findings with respect thereto, based upon substantial evidence, have been made by the Board. That there should be such evidence and findings, if they are to be considered by this Court, has heretofore been clearly indicated. *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co., supra.* But even if the record contained such evidence and findings, they could not, and should not, be used for the purposes suggested. While there was such

evidence and findings in the *Friedman-Harry Marks* case, this Court did not find that company subject to the jurisdiction of the Act because it was a component part of the men's clothing manufacturing industry (which was shown to be an industry dependent in its operations upon interstate commerce), but rather because it, while a local manufacturing concern, was actually engaged in interstate commerce in many respects. It seems to us that the findings in that case of the interstate nature of the industry as a whole were considered more by this Court as corroboration of its conclusion that the company was actually engaged in certain phases of interstate commerce, than as proof that it was subject to the provisions of the Act because it was a component part of an industry which, as a whole, was dependent upon interstate commerce. That this Court has based its conclusions upon the nature of the particular enterprise being considered by it and the effect of that particular enterprise upon interstate commerce, within the meaning of the commerce clause, rather than upon the nature of the entire industry of which such enterprise is a part, is amply borne out by reference to the *Schechter* case, *supra*. In that case, notwithstanding an unreversed finding that the demoralization of the New York poultry market had national interstate repercussions throughout the industry, this Court held that such demoralization, in its effect upon interstate commerce, was only "indirect".

As to the suggestion that if the respondent is excepted from the Act, Federal protection will be denied to all other similarly situated workers in the women's garment industry, many reasons in answer thereto suggest themselves. In the first place, there is no proof that such is, or will be, the fact. In the second place, since practically all business enterprises in this country are component parts of some

nation-wide industry and since all nation-wide industries are dependent largely upon interstate commerce to some degree, what possible reason could there be for the rule, many times reiterated by this Court and referred to above, that the applicability of the Act must be decided upon the facts in each case, if we are to reason that all of the component parts of every nation-wide industry, which is dependent upon interstate commerce as an industry, are to be considered as affecting such commerce, within the meaning of the Act, regardless of the facts? In the third place, the respondent's business, being wholly intrastate in character, is subject to the plenary power of the State of New Jersey and his employees have the protection and benefit of such power.[1] Even if we concede, for the sake of argument, the social desirability of subjecting the respondent's business to Federal regulation for the protection of his workers, such social desirability can afford no constitutional authority for so doing. If such were the case, this

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[1]The common law, decisions and statutes of the State of New Jersey provide, *inter alia*, the following rights and protective remedies to employees engaged in an intrastate enterprise:

1. The right to bargain collectively with their employer, and by peaceable means go on strike to accomplish their purposes.
   International Ticket Co. v. *Wendrich*, 122 N. J. Eq. 222, 193 Atl. 808 (Ch. 1937)
   Canter Sample Furniture House, Inc. v. *Retail Furniture Employes Local No. 109, et al.*, 122 N. J. Eq. 575, 196 Atl. 210 (Ch. 1937)
   REVISED STATUTES OF NEW JERSEY 1937, 34:12-1—See Appendix.

2. The right to picket by peaceable means.
   Evening Times Printing and Publishing Co. v. *The American Newspaper Guild, et al.*, 124 N. J. Eq. 71, 199 Atl. 598 (E. & A. 1938)
   REVISED STATUTES OF NEW JERSEY 1937, 2:29-77—see Appendix.

3. It is a criminal offense for the employer to exact from the employee, as a condition of his employment, that he refrain from joining or renouncing his membership in a labor organization.
   Harris, v. *Geier*, 112 N. J. Eq. 99, 164 Atl. 50 (Ch. 1932)
   REVISED STATUTES OF NEW JERSEY 1937, 34:12-2, *et seq.*—see Appendix.

4. The right given to employees to settle their disputes with employers by arbitration, with the necessary legal machinery to effectuate the same.
   REVISED STATUTES OF NEW JERSEY 1937, 34:13-1, *et seq.*

Court certainly should have extended the power of the Federal Government over the poultry marketing business in the *Schechter* case, because there it definitely appeared in the record that such Federal regulation was socially desirable. But, as this Court said in that case, at page 550:

> "Without in any way disparaging this motive, it is enough to say that the recuperative efforts of the Federal Government must be made in a manner consistent with the authority granted by the Constitution."

If the Board's reasoning has any efficacy, it would necessarily result in the conclusion that all Federal legislation which is socially desirable, or which has socially desirable objectives, confers upon the Federal Government jurisdiction over the subject matters thereof, whether or not that legislation meets the constitutional requirements. If this conception is driven to its logical extremes, it becomes difficult to discover any act or transaction which cannot be said to have some effect upon interstate commerce within the meaning of the Act.

While it is true that the Federal power to protect interstate commerce need not await the disruption of that commerce (*National Labor Relations Board* v. *Jones & Laughlin Steel Corp., supra; National Labor Relations Board* v. *Santa Cruz Fruit Packing Company, supra; Consolidated Edison Co.* v. *National Labor Relations Board, supra*), there must be some substantial proof that it has been, or is likely to be, substantially affected by the alleged unfair labor practices. In the case at bar, the record is absolutely devoid of proof of either. The authority of the Federal Government over interstate commerce may not be pushed

to such an extreme as to destroy the distinction, which the commerce clause establishes, between commerce among the several States and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our Federal system.

A. L. A. Schechter Poultry Corp. v. *United States, supra*
National Labor Relations Board v. *Jones & Laughlin Steel Corp., supra*

The scope of the power of Congress over interstate commerce may not be so extended as to embrace effects upon interstate commerce so indirect and remote that to embrace them would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

A. L. A. Schechter Poultry Corp. v. *United States, supra*
National Labor Relations Board v. *Jones & Laughlin Steel Corp., supra*

True it is indeed, to quote Mr. Justice Cardozo in the *Schechter* case, *supra*, at page 554:

> "If centripetal forces are to be isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our Federal system."

To paraphrase that which was said by the Court in the *Schechter* case, to find "immediacy or directness' in the case at bar is to find it 'anywhere', a result inconsistent with the maintenance of our Federal system.

The importance of maintaining the distinction between what is national and what is local was forcefully recognized by the Circuit Court of Appeals for the Ninth Circuit in the case of *National Labor Relations Board* v. *Idaho-Maryland Mining Corp., supra.* The facts in that case were strikingly similar to those in the case at bar. The respondent was engaged in gold mining in the State of California. It purchased all of its machinery and equipment in that State and sold all of its finished products to two customers in that State. The machinery and equipment purchased in California were brought into the State in interstate commerce and its finished products, although sold in California, subsequently were shipped in interstate commerce by its customers throughout the United States. The Board found that while the respondent was not engaged in interstate commerce, its operations "affected commerce" within the meaning of the Act. The Court, in reversing the decision of the Board, said, at page 131:

> "The finding is not supported by evidence. Respondent's activities—including its labor practices—are wholly intrastate. It buys nothing, sells nothing, ships nothing, and nothing is shipped to it, in interstate or foreign commerce. That respondent is not, itself, engaged in interstate or foreign commerce is conceded. There is no evidence that its activities have any close, intimate or substantial relation to such commerce or the free flow thereof would be obstructed by any dispute to which respondent's labor practices might lead.
>
> "There is no merit in the Board's contention that purchases by respondent, in California, of supplies and equipment manufactured in other states are so closely, intimately and substantially related

> to interstate commerce as to warrant the Board's assumption of jurisdiction in this case. * * * The relation, if any, between interstate commerce and respondent's purchases of supplies and equipment is indirect, remote and unsubstantial.
>
> "If however, such acts may be said to constitute commerce, it is a commerce to which respondent's activities are not closely, intimately or substantially related, and which respondent's labor practices do not directly or substantially affect."

In concluding this argument, we wish to be understood as fully appreciative of the fact that nothing in the text of our Constitution or in the decided cases confers jurisdiction under the Act explicitly or withholds it beyond peradventure. We agree that there are no ready "mathematical or rigid formulas" by which it may or should be resolved and we are aware too that, under the Act, "the subject of Federal power is still 'commerce,' and not all commerce but commerce with foreign nations and among the several States", and that what is interstate commerce (or what is intrastate commerce) should be approached as "a practical conception". We further appreciate that whether or not Federal control over activities long regarded as local has now become "essential or appropriate", involves considerations "of degree", as we understand that term, and that the determination of what are "direct" and "indirect" "effects upon interstate commerce" within what may be accepted tests of Federal authority under the commerce clause, should not be made in an "intellectual vacuum" and in disregard of the structure and scope of present-day enterprise, nor, on the other hand, in disregard or frustration of protective regulatory measures taken

by the States as well as by the Congress. And by a traditional use of the expressions "direct" and "indirect interference" with commerce, it has at times, at least, seemed that "we are doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached".

As indicated above, we do not challenge that the question whether or not particular activities do affect interstate commerce in such a close and intimate fashion, or in any other manner heretofore suggested by this Court, as to give rise to a need and basis for Federal control, and so to lie within authority which might be conferred upon the Board, has been left, by the statute as interpreted by the decisions thus far, to be determined "as individual cases arise". But we do say that a Federal board may not broaden its powers by merely asserting and assuming, not establishing, them.

In some senses, it is true that practically everything which takes place in American business, and indeed in American life, has some effects upon commerce between the States and tends, or may tend, to increase, diminish or affect materially that commerce. If the Board's contention in this cause is to be sustained, the Board at its own uncontrolled option can bring under its own jurisdiction the labor relations and practices of practically every business enterprise, small or large, in the United States, and other Federal agencies can apply the same self-expanding process to confer on themselves authority over practically any other phase of business or of life.

Generalized findings in the terms of the statute cannot remove such matters from plenary judicial review. Boundaries and demarcations between Federal and State authority must still exist and be defined and enforced. They

may not be moved or obliterated at will by administrative discretion. Their declaration and enforcement remains a prime task of unfettered judicial statesmanship.

It is respectfully submitted, therefore, that the respondent is not subject to the National Labor Relations Act because his business is one admittedly intrastate in character, with no interstate ramifications whatsoever, bearing no close and intimate relation to interstate commerce and having no direct and substantial effect upon such commerce, within the meaning of the Act.

II

Even if the respondent is subject to the jurisdiction of the board, that jurisdiction should not be exercised in this case.

A. The respondent's business is wholly intrastate in character and, therefore, subject to the plenary power of the State of New Jersey.

Even if we assume that the Board may have jurisdiction over the respondent because of the effect which unfair labor practices in his business may have upon interstate commerce, there is no justification for the exercise of that jurisdiction. His business is admittedly solely intrastate in character, and, as such, is subject to the plenary power of the State of New Jersey. This Court said in the case of *Pennsylvania Railroad Company* v. *Knight*, 192 U. S. 21, at page 27:

> "But when service is wholly within a State, it is presumably subject to State control. The burden is on him who asserts that, though actually within, it is legally outside the State; and unless the interstate character is established, locality determines the question of jurisdiction."

The record is absolutely barren of any showing of necessity or appropriateness of the Board's proposed exercise of power under the commerce clause. Of course, the Board found that the alleged unfair labor practices affected interstate commerce, but that generalization falls far short of a showing that the intervention, jurisdiction and action of the Board in destruction of State regulation are essential or appropriate; it is far short of satisfying the foregoing rule that "unless the interstate character is established, locality determines the question of jurisdiction". Anything found by the Board here falls far short of overcoming the presumption that the action of the State of New Jersey, through its statute law and the decisions of its courts, to protect the safety, comfort, health, convenience and general welfare of its people, and, in particular, the respondent's employees in their relations with him, will not serve at least equally well and altogether adequately. See page 28, *supra*.

B. The board has failed to allege and clearly prove that the alleged unfair labor practices of the respondent do actually threaten interstate or foreign commerce in a substantial manner.

This Court has always said that the question of whether the alleged unfair labor practices do actually threaten interstate or foreign commerce in a *substantial* manner is necessarily presented where it is sought to apply the Federal power to a business which is purely intrastate in character, and that in determining that factual question regard should be had to all of the existing circumstances. *Consolidated Edison Co.* v. *National Labor Relations Board, supra.* Not only that, but the justification for the exercise of such Federal power must clearly appear and be supported by adequate evidence and findings of appropriate

definiteness. *Florida* v. *United States*, 282 U. S. 194; *Consolidated Edison Co.* v. *National Labor Relations Board*, *supra*. Here again, the record is barren of any evidence or findings justifying the exercise of Federal power in the case at bar. There is certainly nothing to indicate that the alleged unfair labor practices *actually* threaten interstate or foreign commerce in a *substantial* manner. The proof is all to the contrary, in fact, the proofs indicate that the business of the respondent's only customer was not, and could not be, in anywise deleteriously affected by reason of any diminution in the respondent's production. Not only that, but it is undisputed that since the time of the alleged unfair labor practices, and, in particular, since the short strike of part of the respondent's employees terminated, many of the striking employees have returned to work and are still working for the respondent, and the respondent's relations with his employees have been peaceable, harmonious and satisfactory to the employees (II. R. 49-52, 60-64, 100-105, 111, 112, 175-177, 180).

For these additional reasons, therefore, we urge that the jurisdiction of the Board should not be exercised in the case at bar.

III

It is respectfully submitted that for the reasons heretofore presented and discussed, the judgment of the Court below should be affirmed.

LEON GEROFSKY,
Solicitor for Respondent.

T. GIRARD WHARTON,
JOSEPH HALPERN,
Of Counsel.

APPENDIX

The provisions of the Revised Statutes of New Jersey, 1937, referred to in the footnote on page 28, are as follows:

34:12-1. *Combinations to persuade others as to employment not unlawful.* It shall not be unlawful for any two or more persons to unite, combine or bind themselves by oath, covenant, agreement, alliance or otherwise, to persuade, advise or encourage, by peaceable means, any person or persons to enter into any combination for or against leaving or entering into the employment of any person.

34:12-2. *Employer shall not require renouncement of membership in society or brotherhood as condition of employment.* No corporation doing business in this State shall, directly or indirectly, require, as a condition of employment of labor in any branch of its service, that any applicants for employment shall, either individually or collectively, be required to sign any paper, document, or writing of any description, by which an obligation is made or implied of renouncing existing membership in an organization, society or brotherhood, or by which a promise is given of not joining such organization at any future time.

34:12-3. *Employer shall not require employees to renounce membership in or refrain from joining society or brotherhood.* No corporation doing business in this state shall require directly or indirectly that any individuals shall either individually or collectively, in any manner promise to renounce existing membership in a lodge, brotherhood, or labor organization of any kind, or promise to refrain from

joining any such lodge, brotherhood or organization at any future time.

34:12-4. *Penalty.* Any violation of either section 34:12-2 or section 34:12-3 of this title shall be punishable by a fine not to exceed five hundred dollars or three months' imprisonment, or both, as the court may direct.

34:12-5. *Contracts against membership in labor unions or employers' organizations void.* Every contract, agreement, promise or undertaking whether written or oral, express or implied between an employer and employee or prospective employee whereby either party promises or agrees not to join, become or remain a member of any organization or combination of employers or employees, or to withdraw from an employment relation in the event that he join, become or remain a member of any such organization or combination is declared to be contrary to public policy and wholly void and shall not provide or afford any basis for legal or equitable relief in any court.

34:13-1. *Appointment of arbitrators.* Whenever any grievance or dispute of any nature shall arise between any employer, joint stock association, company or corporation engaged in manufacturing, hereinafter in this chapter termed "employer", and his, their or its employees, it shall be lawful by the mutual consent of the parties to submit the same in writing to a board of arbitrators for hearing and settlement. The board shall be composed of five persons. A majority of the employees, at a meeting duly held for that purpose, shall have the power to designate two arbitrators; the employer shall have

the power to designate two arbitrators; and the four arbitrators so designated shall designate a fifth person as arbitrator, who shall be the chairman of the board.

* * * * *

34:13-3. *Board to select secretary and to give notice of time and place of hearing.* When the board is ready for the transaction of business, it shall select one of its number to act as secretary, whose duty it shall be, when ordered by the board, to give at least two days' notice in writing to the parties to the dispute of the time and place of hearing the same, which notice may be served personally on the parties or by fixing the same to the principal outer door or gate of the establishment of the employer. Where for any reason, service cannot be so made the notice may be served as the board shall direct.

34:13-4. *Subpoenas for production of books; attendance of witnesses; penalty.* It shall be lawful for any justice of the peace, or the clerk of any court of record within the county wherein such board of arbitrators may be, to issue subpoenas for the production of books and papers and for the attendance of witnesses before the board. If any such witness, when so subpoenaed, shall not appear in accordance with the command of such writ, or, if appearing, shall refuse to be sworn or affirmed and give evidence, he shall be liable to the same fines and penalties as he would be by law for such default or refusal if committed in any court of record in this state.

34:13-5. *Proceedings before board.* Witnesses shall be examined on oath or affirmation which oath or affirmation the chairman of the board is empower-

ed to administer. A majority of the board may provide for the examination and investigation of books, documents and accounts pertaining to the matters in dispute and belonging to either party. The board may unanimously direct that instead of producing books, papers and accounts before the board, an accountant agreed upon by the entire board may be appointed to examine such books, papers and accounts, and such accountant shall be sworn well and truly to examine such books, documents and accounts as may be presented to him, and to report the result of his examination in writing. Before the examination, the information desired and required by the board shall be plainly stated in writing and presented to the accountant, which statement shall be signed by the board. Attorneys at law or other agents of either party to the dispute shall not be permitted to appear or take part in any of the proceedings of the board, but the same shall be, as far as possible, voluntary.

* * * * *

34:13-7. *Decision of board; time, requisites and effect.* After the matter in dispute has been fully heard, the board, or a majority thereof, shall, within five days, render a decision thereon, which decision shall be reduced to writing, signed by the arbitrators agreeing thereto, and shall set forth such details as will clearly show the points considered by the board and the nature of the decision. The decision shall be a final settlement of the matters referred to the board, and shall be binding and conclusive between the parties. It shall be executed in three parts, one

copy of which shall be given to each of the parties to the dispute, and the remaining copy shall be filed in the office of the clerk of the county, there to remain of record.

* * * * *

2:29-77. *Injunction in labor disputes.* No restraining order or writ of injunction shall be granted or issued out of any court of this state in a case involving or growing out of a dispute concerning terms or conditions of employment, enjoining or restraining any person or persons, either singly or in concert:

a. From terminating any relation of employment, or from ceasing to perform any work or labor, or from peaceably and without threats or intimidation recommending, advising or persuading others so to do; or

b. From peaceably and without threats or intimidation being upon any public street, highway or thoroughfare for the purpose of obtaining or communicating information, or to peaceably and without threats or intimidation persuade any person or persons to work or abstain from working, or to employ or to cease to employ any party to a labor dispute, or to peaceably and without threats or intimidation recommend, advise or persuade others so to do, provided such persons remain separated one from the other at intervals of ten paces or more.